

Federal Communications Commission
Washington, DC 20554

DEC 18 2002

FCC-MAILROOM

In the Matter of)

Request for Review of the)

Decision of the)

Universal Service Administrator by)

Atlantic City Public School District)

Atlantic City, New Jersey)

Federal-State Joint Board on)

Universal Service)

Changes to the Board of Directors of the)

National Exchange Carrier Association, Inc.)

File No. SLD-193676

CC Docket No. 96-45

CC Docket No. 97-21✓

ORDER

Adopted: December 16, 2002

Released: December 17, 2002

By the Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Before the Telecommunications Access Policy Division (Division) is a Request for Review filed by Atlantic City Public School District (Atlantic City), Atlantic City, New Jersey.¹ Atlantic City seeks review of the decision of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), denying two of Atlantic City's Funding Year 2000 requests for discounts under the schools and libraries universal service mechanism.² For the reasons set forth below, we deny the Request for Review and affirm SLD's decision.

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries may apply for discounts for eligible telecommunications services, Internet access, and internal connections.³

¹ Letter from Jonathan Jones, Atlantic City Public School District, to Federal Communications Commission, filed April 25, 2001 (Request for Review).

² Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c). In prior years, Funding Year 2000 was referred to as Funding Year 3. Funding years are now described by the year in which the *funding* period starts. Thus the funding period that began on July 1, 1999 and ended on June 30, 2000, previously known as Funding Year 2, is now called Funding Year 1999. The funding period that begins on July 1, 2000 and ends on June 30, 2001 is now known as Funding Year 2000, and so on.

³ 47 C.F.R. §§ 54.502, 54.503.

The Commission's rules require that the applicant make a bona fide request for services by filing with the Administrator an FCC Form 470, which is posted to the Administrator's website for all potential competing service providers to review.⁴ After the FCC Form 470 is posted, the applicant must wait at least 28 days before entering an agreement for services and submitting an FCC Form 471, which requests support for eligible services.⁵ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.

3. Applicants may only seek support for eligible services.⁶ The instructions for the FCC Form 471 clearly state: "You may not seek support for ineligible services, entities, and uses."⁷ The instructions further clarify that "[w]hile you may contract with the same service provider for both eligible and ineligible services, your contract or purchase agreement must clearly break out costs for eligible services from those for ineligible services."⁸ Although SLD reduces a funding request to exclude the cost of ineligible services in circumstances where the ineligible services represent less than 30 percent of the total funding request, SLD will deny a funding request in its entirety if ineligible services constitute 30 percent or more of the total.⁹

⁴ Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470); 47 C.F.R. § 54.504(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776,9078, para. 575 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S.Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S.Ct. 2237 (June 5, 2000). *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S.Ct. 423 (November 2, 2000).

⁵ 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 471).

⁶ 47 C.F.R. § 54.504 *et seq.*

⁷ Instructions for Completing the Schools and Libraries Universal Service Services Ordered and Certification Form (FCC Form 471) (September 1999) at 18 (Form 471 Instructions).

⁸ Form 471 Instructions at 23

⁹ See *Request for Review of the Decision of the Universal Service Administrative Company by Urban Community Schools*, *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, DA 00-1517 (Com. Car. Bur. rel. July 10, 2000); *Request for Review of the Decision of the Universal Service Administrator by Anderson School*, *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-133664, CC Docket Nos. 96-45 and 97-21, Order, DA 00-2630, para. 8 (Com. Car. Bur. rel. November 24, 2000). The "30-percent policy" is not a Commission rule, but rather is an SLD operating procedure established pursuant to FCC policy. See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, *Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Third Report and Order in CC Docket No. 97-21 and Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058 (1998). This operating procedure, used during SLD's application review process, enables SLD to efficiently process requests for funding for services that are eligible for discounts but that also include some ineligible components. If less than 30 percent of the request is for funding of ineligible services, SLD normally will issue a funding commitment for the eligible services. If 30 percent or more of the request is for funding of ineligible services, SLD will deny the application in its entirety. The 30 percent policy allows SLD to efficiently process requests for funding that contain only a small amount of

Thus, an applicant that seeks support for eligible services in an FRN that also includes ineligible services can avoid denial by subtracting out the cost of the ineligible services at the time of its initial application.

4. Atlantic City appeals the denial of Funding Request Numbers (FRNs) 419286 and 419287, both of which sought discounted maintenance on internal connections from RelComm.¹⁰ FRN 419286 specifically requested discounts on “maintenance of pre-existing as well as newly installed servers,” at a pre-discount price of \$300,000.” In an attachment to the FCC Form 471, this service was described as “maintenance of pre-existing as well as newly installed servers . . . includ[ing] 24 hour, 7 day ~~a~~ *week* monitoring as well as 4 hour emergency response.”¹² A copy of the RelComm service contract, submitted during application review at SLD’s request, separated network server maintenance into 9 items, one of which included “24/7 monitoring of the system activity and performance, log file and error report analysis, preventive maintenance, [and] configuration adjustment at the client’s request (services’ and account analysis, security configuration).”¹³ Because the FCC Form 471 attachment description indicated that monitoring was only one part of the maintenance service being requested, SLD requested and obtained a breakdown of costs, which indicated that the network monitoring item was 40% of the \$300,000 cost.¹⁴

5. The FCC Form 471 description of FRN 419287 stated that “the district has signed up for 24 hour, 7 day a week monitoring as well as 4 hour emergency response by certified network engineers.”” The Service Contract further specified this service as “24/7 monitoring of the condition and performance of the equipment [including] . . . accessibility, security, bandwidth consumption, alarm and error reports” as well as “discovery of the network traffic bottle-necks and security weaknesses based on the network monitoring above”¹⁶

6. On September 29, 2000, SLD issued a Funding Commitment Decision Letter. It denied FRN 419286 on the grounds that 30% or more of this FRN included a request for network

ineligible services without expending significant fund resources working with applicants that, for the most part, are requesting funding of ineligible services.

¹⁰ FCC Form 471, Atlantic City BVE-Admin, filed January 19, 2000 (Atlantic City Form 471), at 4-5, Attachment 2.

¹¹ *Id.*, Attachment 2.

¹² RelComm Contracted Services (Service Contract) at 2 (emphasis added).

¹³ *Id.*

¹⁴ Letter from Jonathan B. Jones, jjones@admin.acboe.org, to John Harrington, jharrin@sl.universalservice.org.

¹⁵ FCC Form 471, Attachment 2.

¹⁶ Service Contract. at 3.

monitoring as well certain other services that SLD found to be ineligible.” Similarly, it denied FRN 419287 because 30% or more of the FRN consisted of network monitoring.”

7. Atlantic City filed an appeal with SLD.¹⁹ It asserted that network monitoring was not, in fact, part of the maintenance service costs requested in either of FRN 419286 or 419287, that the sole monitoring cost was the cost for acquisition of monitoring software, and that this software cost was not part of either FRNs.²⁰ Atlantic City attached an annotated copy of the Service Contract to its SLD appeal. The annotated Service Contract indicated that the monitoring software served to notify the school district of “dangerous conditions,” that physical monitoring was performed by Atlantic City personnel, and that RelComm itself only provided “24/7 technical support on server and switch related issues, maintaining the operating systems at the clients’ request, conducting scheduled check-ups on the servers, error report analysis of performance and assuring that they are working at optimal levels.””

8. SLD denied the appeal, again finding that the services **as** described in the FCC Form 471 and the service contract submitted during application for review included more than 30% ineligible services.” Atlantic City then filed the pending Request for Review.

9. In its Request for Review, Atlantic City reiterates its assertion that the services requested in the two FRNs do not include the cost of network monitoring, that monitoring is done by software and the district’s personnel, and that RelComm’s role is limited to making itself available for technical support upon request.²³

10. Initially, we find that the new evidence regarding the nature of the services requested that was provided both to SLD on appeal and to us is not part of the record on review. In order to facilitate the efficient processing of applications, submission of new evidence following a funding commitment decision letter is permitted only under limited circumstances. Applicants may submit new evidence to demonstrate that an ambiguity or uncertainty in the record was incorrectly resolved by SLD, but may not support an appeal with new evidence that is inconsistent with the information the applicant submitted previously.²⁴ We find that the present

¹⁷ Letter from Schools and Libraries Division, Universal Service Administrative Company, to Jonathan B. Jones, Atlantic City BE-Admin, dated September 29, 2000 (Funding Commitment Decision Letter), at 5.

¹⁸ *Id.*

¹⁹ Letter from Jonathan Jones, Atlantic City School District, to Schools and Libraries Division, Universal Service Administrative Company, filed October 13, 2000 (Appeal to SLD), at 1.

²⁰ *Id.* at 1.

²¹ *Id.*, Attachment at 2.

²² Letter from Schools and Libraries Division, Universal Service Administrative Company, to Jonathan Jones, Atlantic City School District, dated March 30, 2001, at 1-2.

²³ Request for Review, at 2-3; Request for Review, Attachment B, at 3-4

²⁴ SLD web site, Reference Area, “Appeals – SLD Guidelines for Review,”
<<http://www.sl.universalservice.org/reference/AppealsSLDGuidelines.asp>>; *see also Request for Review by Ohio*

case falls into the second category. Regardless of whether Atlantic City intended its service description to indicate that the maintenance services provided by RelCom not include network monitoring, that is the only conclusion that one can objectively draw from the FCC Form 471 Item 21 attachment's description: "[t]his line item [FRN 419286] is for maintenance . . . [and] [t]his maintenance includes 24 hour/ 7 day a week monitoring."²⁵ Further, the FCC Form 471 instructions expressly indicate that the Item 21 attachment describes "the services that the service provider is providing *on which discounts are being sought* . . ."²⁶ To later assert that the services described in the Item 21 description were not, in fact, part of the services being requested in the FRN is therefore inconsistent with the original information. Therefore, we find that Atlantic City's assertion that its Item 21 attachment was not describing the services for which it was seeking discounts constitutes a correction, and will not be considered on appeal.

11. Restricting ourselves to the original record, including the Item 21 Attachment and the Service Contract, we find that SLD correctly found that network monitoring, which is **an** ineligible service under program rules, was **part** of the services requested in both FRN 419286 and 419287.²⁷ Further, in the documentation provided during application review, Atlantic City indicated that the network monitoring line item was 40% of FRN 419286.²⁸ Because the ineligible network monitoring cost was 30% or more of the request, SLD properly denied FRN 419286 under its 30% policy.

12. With regard to FRN 419287, Atlantic City asserts that SLD never requested a breakdown of this FRN, and that SLD's determination that network monitoring is 30% or more of the cost is therefore "confusing."²⁹ It is true that SLD, while requesting a breakdown for FRN 419286, did not request a breakdown of costs for FRN 419287. However, the difference in treatment is explained by the difference in the FCC Form 471 service descriptions. Whereas the FCC Form 471 description of FRN 419286 indicates that the network monitoring was merely one part of the service "included" in the overall maintenance service, thus prompting a request

Public Library Information Network, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., File No. SLD-I65640, CC Dockets No. 96-45 and 97-21, Order, DA 02-431, para. 8 (Com. Car. Bur. rel. February 26, 2001); *Request for Review by Baltimore Junior Academy, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-195870, CC Dockets No. 96-45 and 97-21, Order, 16 FCC Rcd 14776, para. 10 (Com. Car. Bur. 2001) ("it is administratively necessary to require an applicant to be responsible for providing complete and accurate information to SLD in its FCC Form 471 and during the subsequent review process.").

²⁵ FCC Form 471, Attachment 2

²⁶ Form 471 Instructions, at 21

²⁷ See FCC Form 471, Attachment 2; see also SLD web site, Eligible Services List, <<http://www.sl.universalservice.org/reference/eligible.asp>> ("a system of equipment or software used in monitoring, controlling, and managing a communications network" is ineligible).

²⁸ See *supra*, n.14


²⁹ Request for Review, at 3

for a breakdown of costs, the description of FRN 419287 indicates that network monitoring and emergency response was the entire service.³⁰

13. It is established that, where a request contains both eligible and ineligible services, the burden is on the applicant to demonstrate the proportion of eligible services in the request.” SLD’s failure to request a break-down of costs in this case is a result of Atlantic City’s failure to properly describe the services requested in the FRN. Ultimately, it is Atlantic City’s duty to accurately describe eligible and ineligible costs. Because Atlantic City has not demonstrated that the description of services in FRN 419287 was so ambiguous that it should have prompted SLD to seek further information on the proper breakdown of costs pursuant to its policy, we must affirm SLD’s determination that the amount of ineligible services is 30% or more of the request.

14. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Atlantic City School District, Atlantic City, New Jersey, on April 25, 2001 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Mark G. Seifert
Deputy Chief, Telecommunications Access Policy Division
Wireline Competition Bureau

³⁰ Atlantic City Form 471, Attachment 2.

³¹ *Sue Request for Review by Chehnsford Public Schools, Federal-State Joint Board on Universal Service. Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-121771, CC Dockets No. 96-45 and 97-21, Order, 17 FCC Rcd 761, **para. 8** (Conn. Car. Bur. 2002); *see also Universal Service Order*, 12 FCC Rcd at 9022, para. 462.